STATE OF MICHIGAN

COURT OF APPEALS

CHAMPAGNE-WEBBER, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED
November 16, 2001

No. 217994
Court of Claims
LC No. 96-016459-CM

Before: Holbrook, Jr., P.J., and Hood and Griffin, JJ.

PER CURIAM.

In this breach of contract cause of action, plaintiff appeals as of right from the trial court's grant of summary disposition for defendant pursuant to MCR 2.116(C)(10). We affirm.

The case involves a construction contract awarded to plaintiff by defendant. Plaintiff contracted to construct approximately seven miles of Interstate 94. The construction contract was awarded on May 5, 1992, with an open to traffic date set for October 28, 1992. The contract price was a little less than sixteen million dollars. Plaintiff was awarded a $450,000 incentive for finishing the project ahead of schedule. The maximum incentive that could be awarded under the contract was $600,000. Plaintiff brought suit for damages it alleges it incurred due to delays caused by defendant.

Plaintiff argues that the trial court erred in granting summary disposition to defendant because a genuine dispute existed concerning whether defendant owed plaintiff payment for a variety of costs incurred in excess of the type and amount agreed to in their construction contract – costs, plaintiff asserts, that were not contemplated by the contract nor barred by its notice provisions. We disagree. This Court reviews de novo decisions on motions for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any

> reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

First, plaintiff argues that the contract's plain language does not bar recovery for costs incurred due to heavy rains that fell in the summer of 1992. Plaintiff's argument here is twofold. First, plaintiff argues that while the contract does prohibit extensions of time due to weather conditions, the contract does not specifically state that a contractor cannot claim the extra costs associated with adverse weather conditions. Second, plaintiff argues that delays caused by defendant's actions resulted in the loss of "float" days built into the schedule, which in turn "push[ed] the contractor into horrific weather conditions."

The contract clearly states that "[n]o extension of time will be granted for any weather conditions or because of seasonal limitations." It also contains the following provision: "The project is on an expedited schedule . . . . The contractor will be expected to mobilize sufficient manpower and equipment and to work the required overtime to maintain the expedited schedule." Plaintiff is correct that read, in isolation, the former provision does not specifically state that a contractor cannot claim the extra costs associated with adverse weather conditions. However, except for certain exceptions that don't apply here, a contract provision should not be read in isolation. *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 383; 591 NW2d 325 (1998). Instead, the agreement is read as a whole in order to ascertain the parties' intent. *Id.*

When read together, the two provisions quoted above clearly indicate that plaintiff is not due compensation for delays caused by adverse weather conditions. First, we reject plaintiff's contention that it only assumed the risk for foreseeable, regular weather conditions. The contract unambiguously states that no extension of time will be given for "*any* weather condition." The adjective "any" indicates that no extension is to be given for whatever weather condition arises, no matter how severe.[1] If the contract meant to provide for an exception in the event of, for example, higher than average rainfall, such language could have been inserted, as it was for "increases in contract qualities or extra work," "labor disputes," and "delays in delivery of critical materials."[2] Second, the risk that adverse weather could throw off the expedited schedule

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[1] The logical flipside of plaintiff's "regular weather" argument would be that it would not be due excessive incentive payments if the summer of 1992 had turned out to be one of the driest on record, thereby allowing for the work to be completed even sooner than it was. This argument would also be without merit. Plaintiff assumed the risk associated with bad weather and was accordingly due the potential benefit of good weather.

[2] These three contract provisions provide:

> No extensions of time will be allowed for increases in contract quantities or extra work *unless* if [sic] can be shown that such increases or extras affect the critical item of work.
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> No extensions of time will be granted for labor disputes *unless* it can be shown that such disputes are industry wide.

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is expressly allocated to plaintiff, who is also required to mobilize the equipment and manpower needed to maintain the expedited schedule. Thus, plaintiff is required to employ the men and material needed to maintain the schedule in the light of any and all weather conditions that occur.

We also find no merit in plaintiff's second argument. Plaintiff asserts that it incurred extra expenses associated with paving the highway. Plaintiff contends that due to defendant's alleged interference, plaintiff "was forced" to keep a paving "crew on site despite predicted or actual adverse weather," "was forced to mobilize a second batch plant in order to increase production potential," and incurred costs associated with "the use of equipment beyond the dates they were supposed to be used." Despite plaintiff's assertion that allegedly adverse interference by defendant delayed the project by fourteen days, plaintiff admits in its brief on appeal that it began paving on June 21, 1992, which was two days after it planned to begin this work. Nonetheless, plaintiff argues that had not defendant delayed work on the project, plaintiff would have gained 14 days on its paving schedule, which would have allowed it to have work crews stay home on rainy days.

Assuming arguendo that the project was delayed by fourteen days due to defendant's actions, we conclude that plaintiff has failed to show genuine issues of material fact regarding whether this delay was the result of bad faith or the active interference of defendant. *Phoenix Contractors, Inc v General Motors Corp*, 135 Mich App 787, 792-793; 355 NW2d 673 (1984).

Plaintiff claims that defendant delayed the project in six ways. First, plaintiff asserts that the contract was awarded late because it was awarded the afternoon of May 5, 1992. This argument is without merit. The term "by" is defined as meaning "on or before a certain time." Black's Law Dictionary (6th ed), p 201. Further, the contract indicates that it is only "anticipated," not certain, that the contract would be awarded by May 5. We also note that the contract includes the following clearly-worded provision: "In no case, shall any work be commenced prior to receipt of formal notice of award by" defendant. Thus, while plaintiff might have been expecting the contract to be awarded before May 5, defendant cannot be said to have acted in bad faith by awarding it on May 5.

Second, the fact that plaintiff may have had some disagreements with defendant's density checkers does not mean that they were incompetent or that defendant acted in bad faith. Considering the evidence in the appropriate light, we conclude that plaintiff has failed to show that a genuine issue of disputed fact exists on whether defendant acted unreasonably in using these particular density checkers. *Phoenix*, *supra* at 794. We also find meritless plaintiff's third contention that defendant did not act promptly in inspecting the grade on the portion of the highway falling between Hannan and Haggerty Roads. Significantly, the record does not contain

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> No extension of time will be granted for delays in delivery of critical materials unless the delay can be shown to be industry wide and the delay affects the critical item of work. [Emphasis added.]

documentary evidence establishing when the situation was reported to defendant.[3] Assuming that it was discovered and reported on Saturday, June 13, 1992, we do not believe that defendant's inspection on Monday, June 15, was unreasonable.

Plaintiff's fourth, fifth, and sixth contentions are also without merit. Plaintiff was paid for the extra bridge work, failed to provide adequate notice of the staking error claim, and the prohibition against hauling on July 4 was unambiguously stated in the contract.

Given our resolution of the above issues, we need not address plaintiff's assertion that it gave defendant proper notice of its claims under the contract provisions, or that, in the alternative, defendant waived them. We note, however, that this argument is also without merit. The unambiguous terms of the contract state that timely, specific written notice was to be given concerning the nature of the claim and the financial loss incurred, for "each and every claim." Plaintiff failed to provide such notice.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Harold Hood
/s/ Richard Allen Griffin

[3] Entries in the date and day sections of the Inspector's Daily Report where the problem is mentioned have been blacked out.